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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RICHARD BARNETT et al., Plaintiffs and Appellants, v. FIRST NATIONAL INSURANCE COMPANY OF AMERICA, Defendant and Appellant.	B203310 (Los Angeles County Super. Ct. No. BC346657)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Ronald M. Sohigian, Judge. Affirmed.

Paul Sowa; The Arkin Law Firm and Sharon J. Arkin for Plaintiffs and Appellants.

Demler, Armstrong & Rowland and James P. Lemieux for Defendant and Appellant.

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* Under California Rules of Court, rules 8.1105(b) and 8.1110, only the Introduction, the On Cross-Appeal portion of the opinion, and the Disposition are certified for publication.

INTRODUCTION

Plaintiffs Richard and Paula Barnett appeal from a judgment on special verdict in favor of defendant First National Insurance Company of America and an order denying their motion for new trial. Defendant appeals from the judgment and an order awarding costs.

On appeal, plaintiffs contend numerous errors led to a judgment erroneous as a matter of law and unsupported by substantial evidence. For this reason, they also contend, the trial court abused its discretion in denying their new trial motion.

On its cross-appeal, defendant claims error in the trial court's denial of its request for expert fees under Code of Civil Procedure section 998.

For the reasons set forth below, we disagree and affirm.

ON APPEAL

FACTS[1]

A. *Plaintiffs' Property*

Plaintiffs Richard and Paula Barnett (individually, Richard and Paula; collectively, plaintiffs or the Barnetts) purchased a house on Boris Drive in Encino in 1996. The house is located in the foothills of the Santa Monica Mountains. The Barnetts lived there with their two sons, William and Alex.

Boris Drive runs roughly north-south. The house is on the west side of the street. The master bedroom is at the southwest corner of the house, Alex's bedroom is at the

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1 As will be discussed more fully below, on appeal from a final judgment, "we 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . .' [Citation.]" (*Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1096.)

southeast corner of the house, and William's bedroom is north of the master bedroom. The master bedroom and William's bedroom face the backyard and pool area.

The house was constructed with a wood frame on a slab foundation. It has a detached garage/office of similar construction. The Barnetts had a new roof installed in 2001 or 2002.

The property is on a slope running downhill from west to east. The majority of the runoff from the slope to the west of the property goes down the driveway on the north side of the property.

B. ***Defendant's Insurance Policy***

During all relevant time periods, the Barnetts had a homeowners insurance policy issued by defendant. In section I, Property Coverages, the policy sets forth "Building Property Losses We Do Not Cover" as follows:

"We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss: [¶] . . . [¶]

"6. a. wear and tear, marring, scratching, deterioration;

"b. inherent defect, mechanical breakdown;

"c. smog, rust, corrosion, electrolysis, mold, fungus, wet or dry rot;

[¶] . . . [¶]

"9. **Water Damage**, meaning:

"a. flood, surface water, waves, tidal water, tsunami, overflow of a body of water, or spray from any of these, whether or not driven by wind;

"b. water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, hot tub or spa, including their filtration and circulation systems, or any other structure; [¶] . . . [¶]

"16. Weather that contributes in any way with a cause or event excluded in this section to produce a loss. However, any ensuing loss not excluded is covered.

"17. **Planning, Construction or Maintenance,** meaning faulty, inadequate or defective:

"a. planning, zoning, development, surveying, siting;

"b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

"c. materials used in repair, construction, renovation or remodeling; or

"d. maintenance; [¶] of property whether on or off the *insured location* by any person or organization. However, any ensuing loss not excluded is covered."

C. *Rainstorms of 2005*

In January and February of 2005, severe rainstorms hit Los Angeles County. The county received over 18 inches of rain in January, with over 12 inches falling between January 7 and January 10.

The county received almost 14 inches of rain in February. Between February 17 and February 23, it rained almost 11 inches, with almost half of that falling in the 24-hour period between the morning of February 20 and the morning of February 21.

The rainfall in this two-month period was double the 16-inch average annual rainfall for Los Angeles County.

D. *January Damage to Plaintiffs' Property and Report to Defendant*

On the morning of January 8 or 9, Richard and Paula were awakened by rain and wind hitting the house. At 10:00 a.m., Paula went to the garage/office and discovered wet walls and a couple of inches of water on the floor. She and Richard walked around the garage/office but did not see any pooling or streaming water which would account for the water in the garage/office. They moved some of the contents of the garage/office to the house.

On January 9, Richard was lying in bed. Paula went to the master bedroom and saw what appeared to be wet footprints on the carpeting. She then realized that there were two to three inches of water on the floor. She and Richard checked the house and

discovered water coming into William's bedroom as well. They moved things out of the two bedrooms and into the living room, on the east side of the house.

Richard and Paula walked around the property to try to determine how the water was entering the house. Although there was water everywhere, they saw no obvious source of the water in the house. They did not see water running down the slope to the west of the house, and the drain at the bottom of the slope appeared to be working. They saw no pooling or streams of water, and no water buildup against the house.

Within a few days, about a third of the house, including all three bedrooms, had water in it. In addition to the water on the floors, there appeared to be water coming in through the window casings, and there were water stains near the beams in the living room.

On January 10, Paula hired ProDry, which began the process of drying out the house. Among other things, it removed the carpeting from the master bedroom and some of the carpeting from William's bedroom, removed recently installed closets, and cut out portions of the walls.

Also on January 10, Paula called defendant to make a claim. Ordinarily, when a claim came in to defendant, the computer would assign it to a control adjuster, who would handle the claim. Because so many claims were coming in, however, defendant deemed the situation a catastrophe, in which claims would be handled by a catastrophe team. The control adjuster would take the claim and let the insured know that it would be handled by the catastrophe team.

The Barnetts' claim was initially assigned to Karen Hemphill (Hemphill). She spoke to Paula, who described the water damage. Hemphill asked where the water was coming from, and Paula said, "down low." Hemphill explained that the claim would be sent to a catastrophe team, which would be contacting Paula. When Paula added that she had called a water extraction company, which was drying out the wet areas, Hemphill

explained that surface water was not covered,[2] but defendant would be inspecting the damage, so Paula should save all her documents for the catastrophe adjuster.

Once the claim was sent to the catastrophe team, Melba Brazile became the control adjuster. Craig Bowman (Bowman) became the control adjuster on January 29. Steve Doiron became the control adjuster on April 8. Hemphill assisted the control adjuster from April 7 to April 14. After Hemphill visited the property on April 14, defendant transferred the claim to the large loss unit, with the mold unit assisting with the claim. At that time, Stephen Rawlings (Rawlings) became the control adjuster and Larry Thomas (Thomas), of the mold unit, assisted.

Defendant sent inspector David De Tinne (De Tinne), of the catastrophe team, to the property on January 18. De Tinne reported: "Our investigation revealed surface water intrusion to the master bedroom, bathroom and rear bedroom. There was also surface water damage to the detached garage, office and bathroom located in the garage. There was water damage to the front bedroom ceiling. The source and origin of the water appeared to be wind driven rain through the roof flashing." He recommended payment of $1,496, less the $500 deductible for a total payment of $996.

Inspector Luster Drink (Drink) met with Paula on January 31 "to discuss her concerns on this claim." These were that De Tinne had "left two rooms off the . . . estimate that were not surface water [damage]," and "[s]urface water damage to the detached office." Drink reinspected the property and agreed that there were additional damages to the home caused by wind-driven rain. He advised Paula, however, that surface water damage to the office was not covered. He recommended payment of $4,278, less the deductible and depreciation, for a total payment of $3,160.[3]

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[2] According to Hemphill, Paula did not thereafter say that she thought the water was coming in from "down low."

[3] Defendant did at some point make an initial payment to the Barnetts.

E. ***February Damage to Plaintiffs' Property***

On February 18, it began raining heavily. Again, water entered the garage/office and the house. Richard and Paula used shop vacs to vacuum up the water and dump it outside, but the rain continued for four days. They observed water damage around the bay window in the master bedroom, in both boys' bedrooms, and in the living room. Once again, they could not determine how the water was entering the house.

In late February, the Barnetts rented blowers and dehumidifiers. They used these to do the drying out work themselves.

Paula made repeated calls to defendant regarding the damage. In late February she spoke to Bowman. She did not recall telling him about the flooding in February.[4]

F. ***Discovery of Mold and Additional Flooding in March***

In early March, the Barnetts discovered mold on some of the walls. Paula called defendant about the mold within a week of the discovery. The Barnetts had a mold inspection company, Safeguard, test the property on March 10.

There was a third incident of flooding at the end of March. Paula called Service Master to do the clean-up work. Paula did not tell any of defendant's representatives about the incident.[5]

In April, Service Master did mold remediation work on the property. When it was done, Safeguard again tested the property.

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[4] Although Paula testified she reported the second flooding incident, she could not specify to whom she reported it. She testified she thought she was contacting Bowman at that time, but she acknowledged that she did not tell him about the incident.

[5] Paula testified that she "left messages with all of the various adjusters that I was calling at that point," but nobody returned her calls. However, she could not recall telling anyone by phone about the third flooding incident.

Hemphill found nothing in defendant's files indicating that Paula had reported either the February or the March flooding incidents. She noted that had they been reported, they would have been assigned separate claim numbers and been subject to separate deductibles.

G. ***Defendant's Handling of Plaintiffs' Claim***

On March 10, Bowman wrote to the Barnetts on behalf of defendant. He wrote, "After careful review of the facts of the loss and the damage to your home, we regret to inform you that we are unable to provide coverage for the damage to your detached office. Our investigation revealed the cause of loss was surface water." He went on to explain that damage caused by surface water was excluded from coverage. He added that defendant "continues to reserve all rights and defenses which may now exist or which may arise in the future . . . ."

On April 7, Hemphill called the Barnetts and spoke to Paula. Hemphill noted that Paula "says it looks like some more water stains are evident now as things have dried out." They discussed hiring a general contractor to handle the repair work. Paula "advised that she got a mold report $3200.00 from Safeguard," and Hemphill "explained that if there is mold we will need to address it and explained [there was a $]10,000 policy limit." Hemphill therefore requested that Paula submit the mold report as soon as possible so that the control adjuster could review it and, if necessary, transfer the claim to the mold unit. They agreed that Paula would contact her for an appointment once she selected a contractor.

They subsequently arranged for Hemphill to inspect the property on April 14. According to Hemphill's notes, however, Paula "said I'd better bring the definition of surface water in writing with me. [S]he advised she is done playing games and she expects to be paid money this week[]. [¶] She said we are already dealing with an attorney and she has also consulted with a high powered insurance attorney so no more games. [S]he said we can lie but she has eyeballs and she makes a lot of money and went to a prestigious law school so she knows there are no limits on mold, and there is no depreciation on replacement cost. We had better start acting in good faith, no low-balling and no more bad faith or she will be filing a lawsuit Monday morning. '[Y]ou be ready tomorrow.'"

The April 14 inspection did not go well. According to Paula, she was trying to find out how Hemphill could say that the damage was caused by surface water when she

and her husband saw no surface water and the inspectors said the damage was caused by wind-driven rain. Hemphill was smirking and dismissive. She accused Paula of having work done on the house to cover up the fact that the damages were caused by surface water. Hemphill began yelling at Paula, who yelled back at her. Finally, Paula told Hemphill "you have to leave. Get out of my house."

According to Hemphill, Paula "immediately advised that we better take care of all her issues or she is filing a big lawsuit. She wanted [the] definition of surface water. Whenever I tried to explain or ask anything, [she] cut me off." Paula kept raising her voice and threatening to sue. When Hemphill asked questions about the damage, Paula "was not very forthcoming with information" but instead would tell Hemphill to look for herself or ask her what her report said. When Hemphill "repeatedly asked her to please not raise her voice she yelled 'don't you dare tell me what to do'." Paula "then started using profanity and told [Hemphill] to leave."

Hemphill spoke with Thomas and informed him that "mold is present in several areas. Some of the areas where mold is present have been denied for surface water i.e. office area. Some rooms had rain water from roof (living room, Alex's room and possibly master[bedroom]). If there is mold in these areas, it may be covered." She also noted that surface water might be an issue in the master bedroom and William's bedroom, but she was unable to inspect these areas fully and further investigation would be necessary.

The following day, April 15, Rawlings called Paula to let her know he was taking over as control adjuster. She indicated that she wanted to know how the water was getting into the house and whether there was coverage. On April 19, Rawlings suggested inspection of the property by experts, and Paula agreed.

On May 6, Rawlings came to inspect the property with general contractor Bob Jackson (Jackson) and roofing contractor/consultant John Shepherd (Shepherd). Shepherd found only three minor ceiling stains—two in the living room and one in Alex's bedroom. He concluded that they resulted from defective installation of the roof,

wind was not a factor, and the damage was minor, i.e., it did not extend to the lower walls or floor.

Rawlings also looked at the roof. He saw nothing that looked like wind damage.

Rawlings observed that the yard sloped in the direction of the house. He asked Paula about drains in the yard which appeared to have been recently installed. She said they were installed after the damage to the property so that it would not occur again.

After inspecting the property, both Rawlings and Jackson believed that surface water caused the damages due to the exterior concrete around the house being higher than the interior slab. Rawlings noted deterioration of the exterior stucco at ground level, providing "definitive signs of surface water."

On June 20, the Barnetts filed a complaint with the Department of Insurance. On June 23, Thomas sent the Barnetts a reservation of rights letter. He noted that defendant had Shepard Consulting assisting defendant in determining whether there was coverage for the damage.

Defendant responded to the Barnetts' June 20 complaint on July 7. Property Unit Manager Paul M. Rosner apologized for the time it was taking to adjust their claim. He explained that due to the Barnetts' concerns, he had transferred their claim from the catastrophe unit to Rawlings and had hired experts to assist in the investigation as to the cause of loss. He stated that defendant would advise them of its decision once it had completed its investigation.

By the beginning of July, defendant still had not received the experts' reports. Although Rawlings had serious doubts about whether the Barnetts' claims were covered, he decided to go ahead and make an additional payment. He believed that per De Tinne and Drink, defendant had "committed to pay for the repairs caused by the rain that entered the dwelling through the roof and through the window of the home." He noted that "[a]ny denial for repairs that are not a covered loss will have to be determined after the expert reports arrive and are reviewed. There is [*sic*] definitely surface water conditions here. The insured has installed several drain systems around the home after the date of loss. The rooms in the home have some covered damages and are in the

revised estimate. The office has been deleted from the estimate as this would be determined surface water."

In preparing his estimate, he gave the Barnetts "the benefit of the doubt" as to the cause of damages. That is, where there was overlap between damages caused by surface water and covered damages, defendant would pay for the damages. His final estimate, less depreciation and deductible, was $9,132.07. This did not include payment for out-of-pocket expenses and mold, which Thomas would review.

Thomas became control adjuster in early August. After receiving Jackson's report, he believed there was a basis for denying the Barnetts' claims. However, because Rawlings had made a commitment to pay, Jackson decided to go ahead and pay the claim for damages caused by mold. He had defendant pay the $10,000 policy limit for mold damages as well as for the Barnetts' out-of-pocket expenses. In total, defendant paid the Barnetts $33,575.[6]

H. ***The Experts' Opinions***

1. Plaintiffs' Experts

In November 2005, the Barnetts had Leroy Crandall (Crandall), an engineer specializing in soil mechanics and foundation engineering, inspect the property. According to Crandall, on the first of his three visits to the property, Paula told him that she had observed water seeping up through a joint between the bay window addition and the original slab. She also told him the property had drainage problems.[7]

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[6] In her pretrial deposition and discovery, Paula indicated that water damage repair would cost in the $180,000 to $200,000 range. Her expert, contractor Jeffrey Sjobring, estimated that repairs would cost just over $66,000. Another contractor estimated the cost of repairs at about $39,000.

[7] Paula testified that she did not remember telling Crandall in November 2005 that after the rains, she had someone fill in a joint in the foundation between the master bedroom and the bay window so that water could not come up through it. She also did not recall telling him that the drainage for her yard was improper.

According to Crandall, the Barnetts "had a problem with the rear yard drainage." The area around the pool was "paved with concrete. [¶] And the result is that the level of that exterior concrete was higher than the interior floor slab of the home, which is not an approved condition and not a good condition at all." Had the excavation for the pool been deeper, the concrete around the pool would have been lower, then the drainage in the yard would have been away from the house rather than towards it.

The condition of the yard "permit[ted] moisture to penetrate the stucco and possibly enter into the framing. The water intrusion which occurred in the interior of the master bedroom area was the result of exterior water passing under the house and seeping through the joint in the floor slab. [¶] This condition would not have occurred if the exterior paving had been below the level of the interior slab."

When Crandall returned to the property on February 23, 2007, he observed that the Barnetts had had the concrete outside the rear of the house lowered by about three inches, so that it was about level with the interior slab. Crandall was of the opinion that even this was not low enough to prevent problems if intense storms hit again.

Jeffrey Sjobring (Sjobring), a licensed general contractor and public insurance adjuster, inspected the property on February 23 and March 1, 2007. It was Sjobring's opinion that the major source of water in the house was wind-driven, or horizontal, rain, which entered the house through various openings, or breaches, in the roof. The most significant of these was the horizontal gap over the master bedroom's bay window, between the shingles and the flashing above it.

Sjobring explained that the gap was not due to defective construction; it was necessary to allow the shingles to be placed under the flashing. With normal rainfall, there would be no penetration. With an exceptional amount of wind-driven rain, however, "it's a perfect opportunity for this wind that's blowing swirling in that area to take rain and pour it, just push it into and underneath that flashing and into the wall and drip down and cause the damage that we saw . . . ."

Sjobring also explained that the house had a "curb foundation," approximately six inches thick, sitting atop the slab and rising two to three inches above it. Water could not

penetrate the curb foundation, so it would have prevented surface water from entering the house.

According to Sjobring, "[i]n this particular case because of the curb in the areas where the water came in, it's sealed because . . . it had a wire mesh at the bottom. And it held the water in the cavity until the drywall and the plaster came to the point where it broke through and that would take maybe an hour, hour and a half. That water is building up inside that cavity. It has nowhere to go until the thing breaks open and it all spills out that particular night, I would imagine gallons came through there." Because gravity drew the water down from where it entered around the bay window, it gave "the illusion it's coming from the surface."

Sjobring criticized Jackson's opinion as to the cause of the damage to the house, in that Jackson ignored the curb foundation and the issue of wind-driven rain.

2. Defendant's Experts

Pete Fowler (Fowler), a licensed general contractor, inspected the house on February 20, 2007. In his opinion, the majority of the damage was due to the house being poorly situated on the lot, with inadequate provision for drainage, and the elevation of the exterior grade at or above the elevation of the interior grade.

Fowler agreed with Crandall that water could have seeped into the house through the joint in the slab. He thought the vast majority of the damage was caused by water coming through the stucco, however. He explained that stucco is porous, and the paper behind the stucco can only withstand standing water for about 10 minutes. Due to the higher elevation of the external concrete, surface water was standing against the wall of the master bedroom for a period of time. It eventually seeped through the wall and into the house.

Fowler agreed with Sjobring that water entered the house through the gap between the flashing and the shingles. However, he saw no evidence to suggest that that was a major source of water intrusion.

Jackson's testimony was similar to Fowler's. Jackson agreed that surface water entered the house through the stucco, causing the damage.

Shepherd identified a number of roofing construction defects that had caused water intrusion into the house. He did not believe that the gap in the roof over the bay window was a significant source of water intrusion; he saw no evidence of staining that would indicate water intrusion.

DISCUSSION

A. *Trial Court's Refusal to Interpret Exclusion 16*

1. *Julian*

In *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747 (*Julian*), the Supreme Court addressed the effect of an exclusion for damages caused by weather conditions. As summarized by the court, "California Insurance Code section 530 [section 530] provides that '[a]n insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause.' We have construed section 530 as incorporating into California law the efficient proximate cause doctrine, an interpretive rule for first party insurance. [Citation.] Pursuant to the efficient proximate cause doctrine, 'When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss,' but 'the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause.' [Citation.]" (*Julian*, *supra*, at p. 750, fn. omitted.)

The case involved a landslide following heavy rains. The landslide caused a tree to crash into plaintiffs' house. Plaintiffs filed a claim with defendant, their insurer. Defendant rejected the claim under the "weather conditions" exclusion in the policy. The policy also contained an exclusion for landslides. (*Julian*, *supra*, 35 Cal.4th at pp. 751-

752.) The court was called on "to decide whether an insurer may, consistent with section 530 and the efficient proximate cause doctrine, deny coverage for a loss resulting from a rain-induced landslide by invoking, among other exclusions within a form policy, a provision that excludes coverage for losses caused by weather conditions that 'contribute in any way with' an excluded cause or event such as a landslide. It is undisputed that losses proximately caused by weather conditions that do not 'contribute in any way with' another excluded cause or event are covered under the policy." (*Julian, supra,* at p. 750.)

The plaintiffs claimed that section 530 and the efficient proximate cause doctrine prevented defendant from invoking the weather conditions exclusion where the weather conditions cause a landslide. The court rejected "this argument as an improper conflation of the covered peril of weather conditions alone with the distinct, excluded peril of a weather condition (rain) that induces a landslide, and [held] that the insurer may, consistent with section 530 and the efficient proximate cause doctrine, rely on the exclusion to deny coverage for losses proximately caused by the latter peril." (*Julian, supra,* 35 Cal.4th at pp. 750-751.)

The plaintiffs argued that the policy impermissibly violated section 530 and the efficient proximate cause doctrine, in that "[t]he policy purports to exclude losses caused by weather conditions, but only where the weather conditions 'contribute in any way with' earth movement (e.g., landslide), water damage (e.g., flood), or another cross-referenced, excluded peril. Under the plain terms of the policy, losses caused by weather conditions that do not 'contribute in any way with' earth movement, water damage, etc. are covered. Thus the coverage inquiry turns on whether earth movement, water damage, or the like 'contribute[d] in any way with' weather conditions to create a loss. This 'contribute[s] in any way' language . . . allows the insurer to defeat coverage for a loss proximately caused by weather conditions merely by finding a remote peril somewhere—no matter how distant, minor, or independent from the weather conditions—in the causal background." (*Julian, supra,* 35 Cal.4th at p. 758.)

In its analysis of this argument, the court found the threshold question to be "whether section 530 and the efficient proximate cause doctrine inflexibly prohibit an

insurer from insuring against some manifestations of weather conditions, but not others." (*Julian, supra*, 35 Cal.4th at p. 759.) It began by noting that "'[a]n insurance company can limit the coverage of a policy issued by it as long as such limitation conforms to the law and is not contrary to public policy.' [Citation.] 'An insurance policy may exclude coverage for particular injuries or damages in certain specified circumstances while providing coverage in other circumstances.' [Citation.] It follows that an insurer is not absolutely prohibited from drafting and enforcing policy provisions that provide or leave intact coverage for some, but not all, manifestations of a particular peril." (*Ibid.*)

Thus, "an insurance policy can provide coverage for weather conditions generally, but exclude coverage for specific weather conditions such as hail, wind, or rain. The fact that hail, wind, and rain are types of weather conditions does not bind the insurer to insure against all weather conditions, or none at all. A reasonable insured would readily understand from the policy language which perils are covered and which are not. Similar logic applies where the limitations of our language require an insurer to describe a specific peril in terms of a relationship between two otherwise distinct perils (e.g., rain and landslide) in order to plainly and precisely communicate an excluded risk. In such a case, the fact that a policy provides coverage for some, but not all, manifestations of each constituent peril does not necessarily render the clause naming and excluding the 'combined' peril invalid pursuant to section 530 and the efficient proximate cause doctrine." (*Julian, supra*, 35 Cal.4th at p. 759.)

The plaintiffs also claimed the weather conditions exclusion was invalid, "because the existence of the excluded 'peril' identified in the clause, and therefore application of the exclusion, turns on even the most minor contribution of a remote, excluded peril such as earth movement." (*Julian, supra*, 35 Cal.4th at pp. 759-760.) The court agreed that application of the exclusion where the excluded peril was a remote cause of damage "would raise troubling questions regarding the clause's consistency with the efficient proximate cause doctrine. Denial of coverage for such a loss would suggest the provision of illusory insurance against weather conditions . . . ." (*Id.* at p. 760.)

In the case before the court, however, it had to "address only the application of the weather conditions clause to a loss occasioned by a rain-induced landslide." (*Julian, supra*, 35 Cal.4th at p. 760.) This was a real and commonly understood peril, and there was no evidence the landslide was caused by anything other than rain. "Accordingly," the court concluded, "to the extent the weather conditions clause excludes the specific peril of rain inducing a landslide, there is no violation of section 530 or the efficient proximate cause doctrine." (*Ibid*.)

2. Discussions Regarding Jury Instructions and *Julian*

Prior to trial, the court discussed with counsel for the parties the effect of *Julian* vis-à-vis Exclusion 16 in the policy at issue here, which excluded coverage for: "Weather that contributes in any way with a cause or event excluded in this section to produce a loss. However, any ensuing loss not excluded is covered." The court noted that the Supreme Court in *Julian* was "saying that there are conceivable factual situations not presented in *Julian* in which a policy exclusion might be unenforceable" under section 530 or the efficient proximate cause doctrine.

Plaintiffs' counsel noted that "[w]e're dealing with a rain that was a 100-year rain. The evidence could well be that this is the exact type of situation where the Supreme Court would find—would be presented with the issue it left open in *Julian*." The trial court asked counsel: "You would be saying, therefore, that conceding that the policy language would deny insurance benefits to the Barnetts, that policy language should be held to be inapplicable or invalid because it would conflict with Insurance Code section 530 and/or the efficient proximate cause doctrine?" Counsel responded that he was.

The court sought confirmation, "Is it correct then that you are going to say that you concede that the literal language of the policy would exclude coverage but what you're going to be asking me to do is to invalidate the literal language of the policy under the suggestion or point made in the *Julian* case that I've made reference to?" Counsel responded, "As one of three arguments, yes."

His second argument was that, "even assuming that you have a hybrid peril here, that hybrid peril still must be the efficient proximate cause of the loss." He took the position that there was a factual dispute concerning the efficient proximate cause of the loss, and the efficient proximate cause of the loss was not an excluded peril. Rather, it was contractor negligence.

The third argument was "ensuing loss."[8] Counsel explained, "[T]he way I view it would be where weather conditions combine[] with an excluded peril in the policy such as construction defect and the construction defect clause has an ensuing loss provision, then that follows."

Defendant's counsel took the position that "here, we're not dealing with anything that's a remote cause at all. The damages to the Barnetts' house would not have occurred but for the rain and they would not have occurred but for the defects in the roof or but for the defects in the lower portion of their foundation where the water came into the surface."

Defendant's counsel additionally pointed out that the policy contained an exclusion for contractor negligence. He claimed that plaintiffs' counsel misunderstood the ensuing loss provision, which was inapplicable here. It applied where "you have an original [excluded] peril that causes some damages, if that then causes another peril that is not excluded by the policy, then only the damages from the second peril will be covered."

The trial court then turned to the instruction to be given to the jury, a modified version of CACI No 2306,[9] which it planned to give twice, once during orientation and

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[8] The ensuing loss provision states: "However, any ensuing loss not excluded is covered."

[9] CACI No. 2306, titled "Covered and Excluded Risks—Predominant Cause of Loss," provides as follows: "You have heard evidence that the claimed loss was caused by a combination of covered and excluded risks under the insurance policy. When a loss is caused by a combination of covered and excluded risks under the policy, the loss is covered only if the most important or predominant cause is a covered risk.

once in the closing instructions. It noted that the parties had agreed to that instruction with the following modification: The first line would read, "As noted in instructions 2303 and 2304, defendant contends the loss was only caused by a combination of excluded risks." It proposed additional modifications for the orientation, so the jury would not be confused by the reference to other instructions but would have a sense of the focus of the case. There followed a rather lengthy discussion on the wording for the preinstruction.

During trial, the court again discussed the issue of jury instructions and *Julian*. Plaintiffs' counsel objected to CACI No. 2304 as modified by defendant. The instruction read: "The Barnetts claim that one or more of their losses are covered under an exception for 'ensuing losses' to a specific coverage exclusion or exclusions under the policy, namely exclusions 6, 10, 16, and/or 17 under the policy. To establish this coverage, the Barnetts must prove that their loss or losses occurred because of a second cause, and not from the original excluded cause or causes. Further, this second cause cannot itself be excluded by the policy."

Plaintiffs' counsel explained his position that "under California law, that we have a predominant cause of loss test and that you can only have one peril in order to assess the existence of coverage or non-coverage. [¶] Therefore, to have the effectiveness of an exclusion predicated upon the existence of two perils, one for the application of the exclusion and then one for the reduction of the exclusion[,] violates Insurance Code sections 530 and 532 [and *Julian*]." Defendant's counsel disagreed, stating his position

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[[*Name of defendant*] claims that [*name of plaintiff*]'s loss is not covered because the loss was caused by a risk excluded under the policy. To succeed, [*name of defendant*] must prove that the most important or predominant cause of the loss was [*describe excluded peril or event*], which is a risk excluded under the policy.] [¶] [*or*]

"[[*Name of plaintiff*] claims that the loss was caused by a risk covered under the policy. To succeed, [*name of plaintiff*] must prove that the most important or predominant cause of the loss was [*describe covered peril or event*], which is a risk covered under the policy.]"

that for the ensuing loss exception to apply, there must be "[s]omething other than the original damage that resulted from the original excluded peril."

The court suggested that plaintiffs' counsel draft an acceptable instruction. He stated that he was satisfied with CACI No. 2304.[10] He agreed with the court that the following wording would be acceptable: "Plaintiffs claim that their loss is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, plaintiffs must prove that their loss constitutes an ensuing [or resulting] loss under the policy."

The trial court continued to try to get agreement on the meaning of ensuing loss, but counsel could not agree. The trial court then observed, "California courts have long defined ensuing loss as a loss separate and independent from an original peril. . . . [¶] Plaintiffs' losses are neither. They're absolutely reformations of the same gap related losses, losses plaintiffs concede are excluded by [defendant's] faulty workmanship clause. In fact, none of this supposed ensuing loss plaintiff[s] identified can be categorized as ensuing losses or even losses at all."

The court concluded that it would instruct the jury that in order to establish coverage, plaintiffs would have to prove that their loss was an ensuing or resulting loss. "The ensuing loss provisions apply to situations where there is a peril that is a hazard or occurrence which causes a loss or injury separate and independent of but resulting from the original excluded peril. [¶] And where this new peril is not an excluded peril from which the loss ensues." Plaintiffs' counsel disagreed with this instruction.

The court later addressed defendant's proposed Special Instruction No. 15, which read: "Where all causes of a loss are excluded under the terms of an insurance policy, the insurance company does not need to determine which cause was the 'predominant' cause

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10 CACI No. 2304 reads: "[*Name of plaintiff*] claims that [his/her/its] [liability/loss] is covered under an exception to a specific coverage exclusion under the policy. To establish this coverage, [*name of plaintiff*] must prove that [his/her/its] [liability/loss] [arises out of/is based on/occurred because] [*state exception to policy exclusion*]."

or the 'efficient proximate' cause." Plaintiffs' counsel objected to this instruction. He claimed that even in a situation where all causes of a loss are excluded, "[t]he insurance company is supposed to identify what is the predominant cause of loss and from that make a determination as to the potential causes of the loss." The trial court rejected this position and agreed to give defendant's instruction.

3. Interpretation of Writings

Citing the foregoing as examples, plaintiffs claim that their counsel "request[ed] the court to make legal rulings . . . interpreting/construing the Exclusion," i.e., Exclusion 16. Our reading of these portions of the record does not reveal a request to interpret or construe Exclusion 16. Rather, it reveals discussions over jury instructions regarding the applicable law.

Plaintiffs further state that "[e]ventually, the court decided not to read the policy provisions to the jury, stating that counsel could simply make argument to the jury concerning interpretation of Exclusion 16." While this statement is true, the court's decision—to which plaintiffs did not object—was in the course of a discussion on jury instructions. The court made clear it was going to instruct the jury on the applicable law, namely, the efficient proximate cause doctrine. This was what plaintiffs' counsel sought during the entire course of the discussions on jury instructions.

Plaintiffs are correct that an issue of law must be tried to the court, not the jury, prior to the jury trial of factual issues. (Code Civ. Proc., §§ 591, 592.) This includes "questions concerning the construction of statutes and other writings." (Evid. Code, § 310, subd. (a).) Based on these principles, plaintiffs argue that "the trial court should have interpreted/construed Exclusion 16 like the [Supreme] Court interpreted/construed the similar exclusion in [*Julian*]."

As we see it, plaintiffs' actual complaint is not that the trial court failed to interpret Exclusion 16. The trial court implicitly interpreted Exclusion 16 when it instructed the jury as to the applicable law, i.e., the efficient proximate cause doctrine. Plaintiffs' actual complaint is that the trial court interpreted the exclusion incorrectly. That is, plaintiffs

contend that the trial court's instructions as to the applicable law were erroneous. We turn now to that issue.

4. Instruction on Efficient Proximate Cause

Plaintiffs contend the trial court erred in instructing the jury with Special Instruction No. 15 and the first paragraph of CACI No. 2306. Special Instruction No. 15 told the jury that "[w]here all causes of a loss are excluded under the terms of an insurance policy, the insurance company does not need to determine which cause was the 'predominant' cause or the 'efficient proximate' cause." Paragraph one of CACI No. 2306 told the jury that "[d]efendant contends the loss was caused only by a combination of excluded risks. If you agree, you must follow instructions 2303 and CT-2."[11]

We see nothing in *Julian* which requires a jury to determine the efficient proximate cause of a loss when all possible causes of loss are excluded from coverage under an insurance policy. Making the determination would be an exercise in futility.

Plaintiffs nonetheless claim that, under *Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, "once the evidence is sufficient to go to the jury, the jury must determine the efficient proximate cause. No case . . . states or implies that if there is sufficient evidence to go to the jury, that the jury may avoid making the determination of 'efficient proximate cause', and yet come back with a special verdict stating that the insureds did not suffer any damage covered under the policy."

The portion of *Garvey* on which plaintiffs appear to rely[12] contains no such holding. In *Garvey* there were two possible causes of injury—one covered and one

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[11] CACI No. 2303 dealt with whether the mold endorsement was part of plaintiffs' policy. CT-2 addressed "ensuing" or "resulting" loss.

[12] Plaintiffs' brief is rambling and disjointed, and points are often made with no citation to the record or supporting authority, or with a vague reference to a previous citation. To the extent we can discern plaintiffs' points, we address them. To the extent we cannot, we treat them as forfeited. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v.*

excluded. The court concluded: "Coverage should be determined by a jury under an efficient proximate cause analysis. Accordingly, bearing in mind the facts here, we conclude the question of causation is for the jury to decide. If the earth movement was the efficient proximate cause of the loss, then coverage would be denied . . . . On the other hand, if negligen[t construction] was the efficient proximate cause of the loss, then coverage exists . . . . These issues were jury questions because sufficient evidence was introduced to support both possibilities." (*Garvey v. State Farm & Casualty Co.*, *supra*, 48 Cal.3d at pp. 412-413, fn. omitted.)

Requiring the jury to determine the efficient proximate cause of a loss when there are both excluded and covered possible causes, as was the case in *Garvey*, makes sense. Where the jury determines that all possible causes are excluded, there is nothing to be gained by requiring the jury to make the determination as to efficient proximate cause. "The law neither does nor requires idle acts." (Civ. Code, § 3532.)

Plaintiffs also claim that giving the instructions was erroneous because they were unsupported by the evidence. As plaintiffs state, jury instructions given must be supported by the evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.)

It is plaintiffs' position that "'rain' or 'weather' was 'a' cause of their loss, as a matter of law. 1) 'Rain' and 2) 'rain + surface water' are 2 distinct perils to which efficient proximate cause analysis may be applied. This is the case even as to that portion of the rain that fell onto the ground and became arguendo 'surface water.' Moreover, the rainfall was so overwhelming, that any second cause which also contributed to the loss—such as 'surface water'—pales by comparison."

Plaintiffs continue that even if excluded causes, such as construction defects or deterioration, were present, "since none of these other causes was caused, in turn, by weather; and since the other requirements for application of the rule of [*Julian*] . . . were

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State of California (1998) 63 Cal.App.4th 1108, 1115; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

not satisfied; Exclusion 16 cannot be applied to a combination of 1) weather plus 2) one of these other exclusions."

In fact, there was evidence that the majority of plaintiffs' damages was caused by surface water either seeping up through a joint in the foundation in the master bedroom or seeping through the stucco from the outside of the house, where the elevation of the concrete was higher than that of the interior foundation. There also was evidence that damages caused by water entering the house from the roof area were caused by faulty installation of the roof. Both causes are excluded under the policy. The policy also excludes damages caused by "[w]eather that contributes in any way with a cause or event excluded in this section to produce a loss." (Exclusion 16.)

There is nothing in Exclusion 16 that requires the weather to have caused the excluded cause, as plaintiffs seem to be arguing. Additionally, there is nothing in *Julian* which supports plaintiffs' argument. *Julian* holds that "[p]ursuant to the efficient proximate cause doctrine, 'When a loss is caused by a combination of a covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss,' but 'the loss is not covered if the covered risk was only a remote cause of the loss, or the excluded risk was the efficient proximate, or predominate cause.'" (*Julian*, *supra*, 35 Cal.4th at p. 750.)

Under *Julian*, the perils are not "1) 'Rain' and 2) 'rain + surface water,'" as plaintiffs claim. They are rain and surface water. If rain was the efficient proximate cause of plaintiffs' damages, they were covered. If surface water was the efficient proximate cause, they were excluded. Although there was evidence to the contrary, there was evidence that surface water was the efficient proximate cause of plaintiffs' damages. Both Fowler and Jackson testified that the majority of the damage was caused by surface water. Thus, there was evidence to support giving Special Instruction No. 15 and the first paragraph of CACI No. 2306.[13]

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[13] We note that the other cases on which plaintiffs rely have been disapproved by the Supreme Court; *Palub v. Hartford Underwriters Ins. Co.* (2001) 92 Cal.App.4th 645 was

B. ***The Trial Court's Instruction on Ensuing Loss***

Both Exclusion 16, for weather conditions, and Exclusion 17, for faulty planning, construction or maintenance, provide: "However, any ensuing loss not excluded is covered."

The trial court instructed the jury pursuant to No. CT-2: "Plaintiffs claim that their loss is covered under an exception to a specific coverage exclusion under the insurance policy. [¶] To establish this coverage, plaintiffs must prove that their loss constitutes an 'ensuing' or 'resulting' loss under the policy. [¶] The ensuing loss provisions apply to the situation where there is a peril, that is a hazard or occurrence which causes a loss or injury, separate and independent of, but resulting from, the original excluded peril and where this new peril is not an excluded peril, from which loss ensues."

The trial court refused to give plaintiffs' Special Instruction No. 10, which read: "An ensuing loss is damage that follows the excluded loss as a chance, likely, or necessary consequence of that excluded loss."

The trial court based its instruction No. CT-2 on *Acme Galvanizing Co. v. Fireman's Fund Ins. Co.* (1990) 221 Cal.App.3d 170. In *Acme Galvanizing*, a welded seam in a galvanizing kettle failed, causing several tons of molten zinc to escape. The molten zinc damaged surrounding equipment and resulted in a shutdown of the plant. (*Id*. at pp. 174-175.) The kettle rupture was caused by a latent defect, which was excluded under the policy. The plaintiff argued that the escape of the molten zinc and damage to other equipment was covered as an "ensuing loss." (*Id*. at p. 179.)

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disapproved in *Julian* and *Premier Ins. Co. v. Welch* (1983) 140 Cal.App.3d 720 was disapproved in *Garvey*. Plaintiffs' remaining arguments on this point are both unintelligible and unsupported by any authority. Consequently, we treat them as forfeited. (Cal. Rules of Court, rule 8.204(a)(1); *Guthrey v. State of California*, *supra*, 63 Cal.App.4th at p. 1115; *Mansell v. Board of Administration*, *supra*, 30 Cal.App.4th at pp. 545-546.)

The policy at issue provided certain losses were excluded, "'unless loss by a peril not otherwise excluded ensues and then the Company shall be liable only for such ensuing loss . . . .'" (*Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, *supra*, 221 Cal.App.3d at p. 174.) The court "interpret[ed] the ensuing loss provision to apply to the situation where there is a 'peril,' i.e., a hazard or occurrence which causes a loss or injury, *separate* and *independent* but resulting from the original excluded peril, and this new peril is not an excluded one, from which loss ensues. For example, in *Murray*[*v. State Farm Fire & Casualty Co.* (1990) 219 Cal.App.3d 58], the initial excluded peril was the corrosion of the pipe and the leakage of water, and the second resulting peril was the settling of soil [caused by the water leak]." (*Acme Galvanizing Co.*, *supra*, at pp. 179-180.) While the cracked slab caused by the soil settling was an ensuing loss, soil settling was an excluded peril, so there was no coverage. (*Id*. at p. 179.)

In the case before it, the court explained that "there was no peril separate from and in addition to the initial excluded peril of the welding failure and kettle rupture. The spillage of molten zinc was part of the loss directly caused by such peril, not a new hazard or phenomenon. If the molten zinc had ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new covered peril with the ensuing loss covered." (*Acme Galvanizing Co. v. Fireman's Fund Ins*. *Co.*, *supra*, 221 Cal.App.3d at p. 180.)

The trial court's instruction No. CT-2 is consistent with *Acme Galvanizing*. Plaintiffs' Special Instruction No. 10 is not. Plaintiffs argue that *Acme Galvanizing* is not applicable to the instant case, in that the policy in that case referred to a "'loss by a peril not otherwise excluded'" (*Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, *supra*, 221 Cal.App.3d at p. 174), while the instant policy refers to "any ensuing loss not excluded." The instant policy omits the "by a peril" language.

In general, an insurance policy is interpreted in the same manner as any other contract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; see *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) An insurance policy should be interpreted so as to give effect to the mutual intention of the parties. (Civ. Code,

§ 1636; *Waller, supra,* at p. 18.) This intention should be inferred, if possible, from the language of the policy. (Civ. Code, § 1639; *Waller, supra,* at p. 18.) In interpreting the language of an insurance policy, the words used should be given their plain, ordinary meaning unless the policy clearly indicates the contrary. (Civ. Code, § 1644; *Waller, supra,* at p. 18.) The policy should be interpreted as a whole, with all parts given effect. (Civ. Code, § 1641; *Waller, supra,* at p. 18.)

The policy here provides, under the heading "BUILDING PROPERTY LOSSES WE COVER": "We cover accidental direct physical loss to property described in **Building Property We Cover** except as limited or excluded." The following heading is "BUILDING PROPERTY LOSSES WE DO NOT COVER." It provides: "We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." The policy goes on to list the excluded perils.

Under this language, a loss is either covered or not covered. The loss is not covered if caused by an excluded peril. The "coverage" language applies to losses, and the "exclusion" language applies to perils.

Bearing the foregoing provisions in mind, the provision "any ensuing loss not excluded is covered" must mean that any ensuing loss *caused by a peril* not excluded is covered. Any other reading of the provision would be inconsistent with other portions of the policy.

Plaintiffs claim, however, that "the word 'loss' in the relevant 'ensuing loss' exceptions should be construed to mean 'damage', and <u>not</u> 'peril.' Therefore, 'ensuing loss' should be construed to mean 'ensuing damage;[]' 'ensuing loss not excluded' should be construed to mean 'ensuing damage not excluded.'" Since the damages for which they sought payment—damaged drywall, paint, floors, etc.—were not excluded, they fell within the ensuing loss exception.

This interpretation would render the excluded perils portion of the policy a nullity. Coverage would be based on the type of damage, not on the cause of the damage. We

cannot interpret the policy in that manner. (Civ. Code, § 1641; *Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 18.)

Plaintiffs rely on *Arnold v. Cincinnati Ins. Co.* (2004) 276 Wis.2d 762 [688 N.W.2d 708] in support of their interpretation of the policy. Rather than support plaintiffs' position, *Arnold* in fact supports our construction of the ensuing loss provision.

In *Arnold*, the ensuing loss provision in the exclusions section of the policy read: "However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered." (*Arnold v. Cincinnati Ins. Co., supra,* 688 N.W.2d at p. 713.) The court noted, "'Ensue' means to '2: take place afterward,' either 'a: to follow as a chance, likely, or necessary consequence . . .' or 'b: to follow in chronological succession.' Webster's Third International Dictionary 756 (1993). Although 'ensue' thus has two common meanings, we conclude that only one is reasonable in the context of the ensuing loss clause in this policy. A reasonable insured would understand that an ensuing loss is not simply any loss to covered property that chronologically follows a loss excluded in subsection 2. If there were no relationship other than this chronology between the excluded loss and the ensuing loss, there would be no logical reason to refer to the ensuing loss in this subsection. Thus, a reasonable insured would understand, based both on logic and on the use of 'However' at the beginning of the sentence, that the meaning of 'ensuing' here is a loss that follows the excluded loss 'as a chance, likely, or necessary consequence' of that excluded loss." (*Arnold, supra,* at p. 716.) Therefore, in the context of the faulty workmanship and faulty materials exclusions at issue in the case, the court concluded "an ensuing loss is a loss that is not directly caused by faulty workmanship or faulty materials, but nonetheless follows as a 'chance, likely, or necessary consequence' of the loss caused by faulty workmanship or faulty materials." (*Ibid.*)

The court did not stop its analysis at this point, however. The plaintiffs claimed that ensuing losses were "all losses that follow and are a consequence of either faulty workmanship or faulty materials, even if the excluded cause is the only cause of the ensuing loss." (*Arnold v. Cincinnati Ins. Co., supra,* 688 N.W.2d at p. 716.) But, the

court concluded, "[t]his is not a reasonable construction of the ensuing loss clause because it completely eviscerates the preceding sentence, which plainly excludes losses caused by the activities, events, and materials listed in subparagraph c. We conclude that a reasonable insured would understand that, in addition to being a loss that follows as a chance, likely, or necessary consequence of the excluded loss, an ensuing loss *must result from a cause in addition to the excluded cause*." (*Ibid*., italics added.)

The insurer claimed that the additional cause must be a "'separate and independent peril,'" relying on *Acme Galvanizing*. (*Arnold v. Cincinnati Ins. Co.*, *supra*, 688 N.W.2d at p. 718.) The court found "no basis in the policy language for limiting the cause of an ensuing loss to a 'separate and independent peril.'" (*Id*. at p. 719.) All that was required was that there "be a cause in addition to the excluded cause," and that the loss not be excepted or excluded elsewhere in the policy. (*Ibid*.)[14]

We reject plaintiffs' interpretation of the ensuing loss provisions of the policy. The trial court's interpretation of the provisions, as expressed in No. CT-2, was correct.

Plaintiffs next assert that, if the trial court's interpretation of the ensuing loss provisions is correct, the provisions are unenforceable as violative of the efficient proximate cause doctrine. Their argument in support of this assertion is unintelligible. It appears that they are arguing that if there is an "original excluded peril" and a second peril, "separate and independent of, but resulting from, the original excluded peril" *Julian* requires that the two perils be analyzed under the efficient proximate cause doctrine to determine which was the predominant cause of the loss.

This is not the case, in that there are two losses, and each must be analyzed separately as to cause. This is illustrated by *Acme Galvanizing*. There was "the initial excluded peril of the welding failure and kettle rupture," which caused losses due to the molten zinc. (*Acme Galvanizing Co. v. Fireman's Fund Ins. Co.*, *supra*, 221 Cal.App.3d

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[14] Inasmuch as plaintiffs claim any error in or prejudice from the use of the "separate and independent" language in No. CT-2, we do not address the question whether there is any distinction between a "separate and independent peril" and an "additional" peril.

at p. 180.) Had "the molten zinc . . . ignited a fire or caused an explosion which destroyed the plant, then the fire or explosion would have been a new . . . peril with the ensuing loss," and a separate analysis of that peril and loss would determine whether that loss was covered or excluded. There is no violation of the efficient proximate cause doctrine.

C. ***The Trial Court's Failure to Interpret the Term "Surface Water"***

Defendant requested an instruction defining "surface water" as "water which comes from rainfall, from melting snow or from springs, which seep or percolate or vagrantly flow over the surface of the land. 'Surface water' is different from lakes or ponds because it has no permanent or substantial existence and follows no defined course or channel."

Plaintiffs' counsel objected to this instruction, explaining, "There are three different—at least in the evidence here, there are three different definitions of—this is the fourth—of the term surface water. There was the surface water definition that Mr. Rawlings put in his letter to my clients. There was the surface water definition that Mrs. or Ms. Hemphill testified that she gave my client. And then there's a surface water definition used by Mr. Rawlings as I recall. [¶] They're all different. My clients waited six months according to them to get [a] definition."

The trial court asked, "You say I shouldn't give a prescriptive definition when the evidence shows that there were different definitions being used by the parties in the case?" Plaintiff's counsel answered, "Yes." The trial court therefore did not give the requested instruction.

Plaintiffs now contend the trial court erred in not construing the term "surface water." Under the doctrine of invited error, by objecting to the instruction defining surface water, plaintiffs are barred from complaining of the trial court's failure to instruct the jury on the definition. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403; *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212.) In order to avoid this result, plaintiffs

claim the definition of "surface water" in the policy was a question of law which could not be tried by the jury as one of fact.

Only an ambiguous contract requires interpretation. (See Civ. Code § 1637.) The term "surface water" is not ambiguous. As defendant points out, as early as 1917, the Supreme Court stated: "Surface waters, it is well understood, are those waters from rainfall, from melting snows, from springs, which seeping or percolating, or vagrantly wandering over the surface of the earth, finally, in obedience to natural law, gather into well-defined channels, where their character as surface waters at once ceases and the waters themselves take on the new character of the body of a defined stream." (*Gray v. Reclamation Dist. No. 1500* (1917) 174 Cal. 622, 650; accord, *Everett v. Davis* (1941) 18 Cal.2d 389, 393.)

The cases cited by plaintiffs do not compel a different conclusion. *State Farm Lloyds v. Marchetti* (Tex. Ct.App. 1997) 962 S.W.2d 58, 61 defines "surface water" as "water or natural precipitation diffused over the surface of the ground until it either evaporates, is absorbed by the land, or reaches channels where water naturally flows." This definition is essentially the same as the one that the trial court was going to give.

A previous case from Texas, *Transamerica Insurance Company v. Raffkind* (Tex.Civ.App. 1975) 521 S.W.2d 935, noted that "surface water" had not yet been defined by Texas courts. The parties cited a number of cases defining the term. The court responded, "It would not necessarily be fruitful to quote any of the definitions given to surface water; suffice it to state that all of the definitions assign to surface water a terranean nature—that is, water upon the earth which does not form a well defined body of water or a natural water course—as distinguished from subterranean water which is or lies beneath the surface." (*Id*. at pp. 938-939.)

In *Transamerica Insurance Company v. Raffkind*, *supra*, "run-off water ponded next to the home ran through weep (ventilation) holes in the brick veneer into the space between the brick veneer and the slab foundation. The water passed through the crack between the floor slab and the foundation on which both the floor slab and the brick veneer rests into the earth beneath the floor slab. By capillary action the water saturated

the soil to the point that some of it seeped into the non-water-tight ducts. In the natural process of evaporation which was accelerated by use of the heating system, water vapor was discharged into the house where it was bound to cause damage." (521 S.W.2d at pp. 937-938.) The court concluded that the damage was not caused by surface water: "None of the damage was attributable to the water while it was upon or passing over the surface of the ground; all of the damage was caused by or resulted from the water after it had lost its status as surface water by being absorbed into the ground." (*Id*. at p. 939.)

Plaintiffs argue the evidence here should have led to the same result as a matter of law. The evidence as to the cause of plaintiffs' damage was disputed. Therefore, it was a question of fact for the jury. Also, the question whether the cause was surface water or not was a factual one for the jury. The trial court was not required to instruct the jury that, as a matter of law, plaintiffs damages were not caused by surface water, as plaintiffs appear to be claiming.

D. ***Enforceability of the Mold Endorsement***

Plaintiffs' policy originally provided in Exclusion 6: "We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss: [¶] . . . [¶] c. smog, rust, corrosion, electrolysis, mold, fungus, wet or dry rot . . . ."

On April 3, 2003, defendant sent plaintiffs a letter regarding renewal of their policy and a copy of the new policy. Page 1 of the letter notified plaintiffs that changes had been made to their policy and they should review the declarations page, policy and enclosed notices carefully. There followed a page headed in large type: "**IMPORTANT NOTICE—READ CAREFULLY**." Underneath this, in smaller type, was the heading: "**CHANGES TO YOUR POLICY COVERAGES**." The notice then stated: "With this renewal you will find policy terms called **SPECIAL PROVISIONS**. They are changes we have made to your Homeowners policy as well as incorporating state mandated language. It is important that you review these changes carefully. [¶] This summary is

only to help in your review but does not provide coverage or become part of your policy. [¶] **Fungi**. We are providing $10,000 under Additional Property Coverages if a covered loss under the policy also includes fungi. This amount can be applied to the fungi portion of the loss. Fungi remains excluded unless it results from a loss that is covered."

This page also states: "Reviewing your Special Provisions you will see new definitions and other changes. We have described the changes we believe are most significant. Because any change might be significant in any particular loss we are not able to describe the effect of every change and are not listing every change in this summary. We ask that you read the new Special Provisions and keep them with your policy. . . ."

Following is a page headed in large type: "**SPECIAL PROVISIONS—FUNGI, WET OR DRY ROT, OR BACTERIA**." This page contains a new Exclusion 6c, which applies to "smog, rust or other corrosion, or electrolysis." It contains additional property coverages for fungi, wet or dry rot, or bacteria. It provides that ***"Fungi"*** means any type or form of fungus, including yeast, mold or mildew . . . ."

Thereafter is a page headed in large type: "**SPECIAL PROVISIONS—CALIFORNIA**." It indicates that Exclusion 16 "is deleted and replaced by the following: [¶] 16. Weather conditions that contribute in any way with a cause or event excluded in this section to produce a loss." The new exclusion 16 eliminates the ensuing loss provision.

The trial court gave the jury two instructions regarding the mold endorsement. At plaintiffs' request, it instructed the jury pursuant to Plaintiffs' Instruction No. 1: "Upon renewal of an insurance policy, an insurance company has the duty to conspicuously bring to the attention of the insured any changes in the terms and conditions of the policy which reduce the coverage afforded by the policy. If the insurer fails to do so any change in the policy that reduces or limits coverage is ineffective."

The court also instructed the jury with CACI No. 2303 as requested by defendant: "First National and the Barnetts dispute the governing language of the insurance policy based on whether the 7-page endorsement entitled "Special Provisions—Fungi, Wet or

Dry Rot, or Bacteria" was part of their insurance policy as of the date of loss in January 2005. You will decide whether that endorsement was part of the policy."

Plaintiffs argue that the question whether the endorsement was sufficiently conspicuous to be part of the policy was a question of law for the court, not forfeited by plaintiffs' failure to raise the issue below. However, not only did plaintiffs fail to raise this issue below, they requested that the issue be submitted to the jury when they requested Plaintiffs' Instruction No. 1. Hence, under the doctrine of invited error, plaintiffs are barred from complaining of the trial court's failure to decide the issue as a matter of law. (*Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at p. 403; *Mary M. v. City of Los Angeles*, *supra*, 54 Cal.3d at p. 212.)

E. ***Remaining Contentions***

Plaintiffs assert the trial court's instructional and legal errors were prejudicial. Having found no legal or instructional errors, we reject this contention.

Plaintiffs further claim there was coverage for their damages as a matter of law, and there is no substantial evidence to support the judgment. We disagree. There was conflicting evidence as to the cause of plaintiffs' damages, and there was evidence that the damages were caused by surface water and thus excluded from coverage.

Finally, plaintiffs assert that the trial court abused its discretion in denying their motion for a new trial. Their assertion is based on claims we have rejected above. Hence, they have shown no abuse of discretion.

ON CROSS-APPEAL

PROCEDURAL BACKGROUND

Prior to trial, defendant served plaintiffs with an offer to compromise pursuant to Code of Civil Procedure section 998 (section 998). The offer was in the amount of

$100,000 "in favor of plaintiffs Richard Barnett and Paula Barnett jointly, with each side to bear their/its own costs." Plaintiffs did not accept this offer.

Following trial and judgment in its favor, defendant filed a memorandum of costs. This included a claim for expert witness fees in the amount of $82,361.52. Under section 998, subdivision (c)(1), "[i]f an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, . . . the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, . . . actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant."

Plaintiffs filed a motion to tax costs. They challenged the claim for expert witness fees on the ground section 998, subdivision (c)(1), does not apply where a single offer is made to two plaintiffs.

Defendant filed an objection to the motion to tax costs. It took the position that section 998, subdivision (c)(1), applies where the plaintiffs have a "unity of interest."

The trial court granted the motion to tax costs as to the claim for expert witness fees. In doing so, it agreed with plaintiffs' position.

DISCUSSION

Defendant contends the trial court erred in granting the motion to tax costs as to the expert witness fees. The trial court's ruling as to the application of section 998, subdivision (c)(1), is reviewed de novo. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 797.)

In *Meissner v. Paulson* (1989) 212 Cal.App.3d 785, a joint offer was made to the two plaintiffs. To be accepted, both plaintiffs had to consent to settlement and agree as to apportionment of the settlement offer between them. (*Id*. at pp. 790-791.) The court concluded that in situations such as the one before it, "[p]laintiffs would be required to

second-guess all joint offers to determine whether a failure to reach agreement with coplaintiffs would cause a risk of section 998 costs against them. We believe the Legislature did not intend to place this burden on offerees. To enforce the purpose of section 998, we find as a matter of law only an offer made to a single plaintiff, without need for allocation or acceptance by other plaintiffs, qualifies as a valid offer under section 998." (*Id*. at p. 791.)

Since *Meissner*, courts have held that a joint offer under section 998 is not automatically invalid but must be closely examined in making the determination whether a party has received a more favorable judgment. (*Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 628-630; *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 745-747; but see *Gilman v. Beverly California Corp.* (1991) 231 Cal.App.3d 121, 124-126.)

In support of its claim that its joint offer was not invalid under section 998, defendant relies on *Vick v. DaCorsi* (2003) 110 Cal.App.4th 206, which was decided by this court. In *Vick*, plaintiffs bought a home from defendants. Shortly after the purchase, plaintiffs discovered the home had been improved illegally. They sued defendants for breach of contract and fraud. Prior to trial, defendants made plaintiffs an offer to settle pursuant to section 998. Plaintiffs did not accept the offer. Defendants prevailed at trial. They then filed a memorandum of costs in which they sought to recover expert witness fees. The trial court denied recovery of the fees on the ground defendants' section 998 offer was not apportioned between the two plaintiffs. (*Id*. at pp. 208-209.)

On appeal, the court noted that *Meissner* attempted to address problems resulting when a defendant makes an unallocated offer to multiple plaintiffs which is conditioned on acceptance by all plaintiffs. (*Vick v. DaCorsi*, *supra*, 110 Cal.App.4th at p. 211.) First, if the plaintiffs obtain a money judgment, it may be impossible for the trial court to determine whether any particular plaintiff received a judgment less favorable than the settlement offer. (*Ibid*.) Second, a joint offer places a plaintiff who wishes to settle at the mercy of one who does not, frustrating the goal of section 998 to encourage settlement. (*Ibid*.)

The court then observed that "[n]one of these concerns, however, apply to a case such as the one before [it] where the plaintiffs are husband and wife; their suit arises out of their purchase of community property; they are suing on choses in action which are community property; and their recovery would be community property." (*Vick v. DaCorsi, supra*, 110 Cal.App.4th at p. 212, fn. omitted.) They sought no recovery peculiar to one of them; either or both of them could have accepted the offer on behalf of the community. (*Ibid*.) "Indeed, requiring married couples with a common interest in the chose in action be allowed to accept or reject joint offers individually could result in the plaintiffs gaming the system by having one spouse accept the offer and the other reject it. 'That way they could both benefit if the judgment is greater than the offer, and could both avoid incurring costs . . . if it is less.'" (*Id*. at pp. 212-213, fn. omitted.) Thus, the court concluded, the defendants' section 998 offer was valid. (*Id*. at p. 213.)

In *Weinberg v. Safeco Ins. Co. of America* (2004) 114 Cal.App.4th 1075, also decided by this court, husband was involved in arbitration with defendant over uninsured motorist coverage. After receiving an award above the policy limits, defendant paid the policy limits. Husband and his wife then sued defendant for bad faith but lost. Defendant sought expert witness fees under section 998, but the trial court ruled defendant's joint offer to compromise invalid and denied the request. (*Id*. at pp. 1079, 1085-1086.)

Defendant claimed error, relying on *Vick v. DaCorsi*. This court disagreed. It noted that the wife's bad faith claim was "a separate, not derivative claim," even though it was based on husband's uninsured motorist claim. (*Weinberg v. Safeco Ins. Co., supra*, 114 Cal.App.4th at p. 1087.) "'It certainly can be expected that when a husband or wife is injured in an uninsured motorist accident and the claim for that accident is wrongfully denied by their insurer, both husband and wife will incur expenses not necessarily limited to attorney fees, and that each may suffer varying degrees of emotional distress.'" (*Ibid*.) Since the husband and wife "did not have a single, indivisible injury," defendant's joint offer was invalid and it could not recover expert witness fees under section 998. (*Ibid*.)

Under the holding of *Weinberg*, defendant's joint settlement offer to plaintiffs was invalid. Like the husband and wife in *Weinberg*, the Barnetts did not have a single, indivisible injury. Each could have suffered varying degrees of emotional distress as a result of the allegedly bad faith handling of their insurance claim even though the underlying dispute with defendant related to a single policy covering damage to the residence in which they had a common interest. (See *Weinberg v. Safeco Ins. Co.*, *supra*, 144 Cal.App.4th at p. 1087.)

As defendant points out, however, with certain exceptions not applicable here, a cause of action for damages is community property, as is any recovery on that cause of action. (*Vick v. DaCorsi*, *supra*, 110 Cal.App.4th at p. 212 & fn. 35; cf. *Parker v. Walker* (1992) 5 Cal.App.4th 1173, 1182-1183 ["[a] cause of action to recover money in damages, as well as money recovered in damages, is a chose in action and therefore a form of personal property"].) This is true whether the cause of action is for injury to real property or financial interests or for personal injuries. (Fam. Code, § 760.) Thus, whether or not the injuries claimed in a lawsuit by a husband and wife are "indivisible" or "separate," there is no reason to require a settlement offer to be made separately to each spouse to be valid under section 998. "[U]nlike an offer expressly conditioned on acceptance by all plaintiffs, the offer in this case did not have to be accepted by both [spouses] to be effective. Family Code section 1100, subdivision (a) places 'management and control of the community personal property' in 'either spouse.' Thus either [spouse] could have accepted [defendant's] offer on behalf of the community." (*Vick*, *supra*, at pp. 212-213.)[15] Moreover, a "joint" settlement offer made to husband and wife need not be allocated between them; the spouses have equal interests in all the proceeds. (*Id*. at p. 212.) Thus, the apportionment problem and the potential difficulty of determining whether an individual plaintiff received a judgment more or less favorable than his or her

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[15] One spouse who believes the second spouse has improperly accepted a settlement offer that affects the rights of both husband and wife to a community asset may have a claim for breach of fiduciary duty. (See Fam. Code, § 1100, subd. (e).)

share of the defendant's settlement offer, addressed in *Meissner v. Paulson*, *supra*, 212 Cal.App.3d at pages 790 through 791, simply does not exist.

In reaching the contrary conclusion in *Weinberg*, we did not fully address the effect of community property law on the determination whether a settlement offer made jointly to a husband and wife is valid under section 998, apparently because this point was not raised or briefed on appeal by either party. Now that we have fully considered the issue, however, we conclude our analysis in *Weinberg* was mistaken and will not follow it in the future. Nonetheless, the Barnetts were entitled to reject what appeared to be an invalid offer without fear that they could thereafter be liable for expert fees and other costs under section 998. (See *Newman v. Emerson Radio Corp.* (1989) 48 Cal.3d 973, 978-979 [although judicial decisions are usually given retroactive effect, even if they represent a clear change in the law, consideration of fairness and public policy may justify an exception to this general rule]; *Bearden v. U.S. Borax, Inc.* (2006) 138 Cal.App.4th 429, 443 [same].) Accordingly, although in the future we would consider defendant's settlement offer to plaintiffs valid under section 998, in this case we affirm the trial court's decision granting plaintiffs' motion to tax costs as to defendant's claim for expert witness fees.

DISPOSITION

The judgment and orders are affirmed. The parties are to bear their own costs on appeal.

JACKSON, J.

We concur:

PERLUSS, P. J. ZELON, J.